**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| **SBM MANAGEMENT SERVICES** | ) | |
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| **Respondent** | ) | **Case Nos.: 05-CA-129128** |
| | ) | **05-RC-126500** |
| **-and-** | ) | |
| | ) | |
| **INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL, UFCW** | ) | **UNION BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** |
| **Charging Party** | ) | |

Now comes the Charging Party, the International Chemical Workers Union Council/UFCW (Union), and hereby opposes "Respondent's Exceptions to the Administrative Law Judge's Recommended Decision and Order"[1/] and responds to "Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision" in the above-captioned matter. In doing so, the Union incorporates by reference and relies on the brief of the Counsel for the General Counsel in this case that also opposes the Respondent's exceptions.

While the Counsel for the General Counsel presumably will be making arguments only in the "CA" case regarding the allegations on the "bonus" issue, the Union submits that, if the Board concurs with the General Counsel's, the Union's, and the Judge's position that the Respondent committed an unfair labor practice regarding its timing and payment of said bonuses, those unlawful

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[1/] References to Administrative Law Judge Arthur J. Amchan herein, to his Decision and to the Transcript of the hearing in this case, as well as the admitted General Counsel, Respondent, and Charging Party exhibits therein will be cited, respectively, as: "Judge;" "(JD, p.__, line __);" "(T. __);" "(GC-__);" "®- __)" and "(CP- __)."

actions also constitute objectionable conduct supporting the Union's position in the "RC" case, such that the results of the representation election should be overturned and the Judge's recommendation that the election be re-run likewise should be sustained.

## I. STATEMENT OF THE FACTS

As part of its Statement of the Facts, the Union incorporates by reference Section II, THE STATEMENT OF FACTS, from its "Brief in Support of Union's Cross-Exceptions" being filed simultaneously with the Union's Cross-Exceptions in the above-captioned case. Additionally, the Union states as follows:

At the hearing, SBM stipulated that it has no written policy on bonuses. (T. 8). The Judge similarly found SBM has no formal policy of paying bonuses. (JD, p. 3, line 27). SBM's site manager, Ruben Chavez, testified that each SBM location around the Country sets up its own practices for incentive programs, such as bonus checks, gift cards, parties, or food, depending on its own particular needs (T. 128) and that its bonus policies were different for each site. (T. 137).

While SBM allegedly had a "Great job" bonus program at other locations, there was no showing that potential unit employees were aware of any practice elsewhere of paying such bonuses.[2/] Moreover, no other SBM site does Triple cleans as does the Elkton site, the type of work

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[2/] Respondent's witness, GMP Supervisor Amanda Turner, who may have given some hearsay testimony about such a bonus program elsewhere, there was no evidence that the potential unit employees were aware of any "Great Job" bonus program elsewhere. (T. 143, 148). Nevertheless, evidence about *any ad hoc* bonus program elsewhere was completely inadequate, unreliable, and irrelevant, as argued in the Union's "Brief in Support of Union's Cross-Exceptions" on Cross-Exception No. 5.

Moreover, the four employees identified in SBM's Brief at p. 12, Cruz, Figueroa, Mendoza, and Adams, did not work at the Elkton facility; they cannot be identified on the document as potential unit or supervisory employees; it is not clear for what the alleged payments to them were made, if even received; or at which location they worked, etc.

for which SBM allegedly paid the bonus. (T. 163). Consequently, even though the Counsel for the General Counsel more than adequately challenged the relevancy and showed the inadequacy of SBM's evidence of a past-practice of bonus payments elsewhere, SBM's failure to establish that potential unit employees were aware of an SBM consistent, past practice bonus policy *elsewhere* makes such evidence of little, if any, relevance to the Elkton facility.[3/]

In a weak effort to establish a past practice of paying "Great Job" bonuses at the Elkton facility, SBM introduced evidence at the hearing regarding a January, 2014, "bonus" safety poker game. However, that *ad hoc* program was completely dissimilar and established nothing like what occurred on May 16, 2004. The safety poker game only occurred once and not everyone, who supposedly was eligible, received a safety "bonus," but received only an opportunity to receive more poker cards and, therefore, a potentially better poker hand that might, then, result in the so-called safety "bonus." It was having a better poker hand, not necessarily being a safer employee, that might result in a safety "bonus" for just some employees. (T. 145-46). Moreover, the so-called possible safety bonuses were not for the same type of activity as were the "Great Job" bonuses (T. 156, lines 21-24); were not given to all who were eligible, *i.e.*, whoever got the best poker hand won the

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[3/] In part , SBM relied on Respondent Exhibits 4 and 5 to establish that it gave bonuses elsewhere. However, its witnesses, as opposed to its legal counsel, did not adequately identify these exhibits, nor always introduce evidence about the identity of the individuals listed, or the type of their connection to SBM, *i.e.*, whether they were managers, rank-and-file employees, or even clients or partners; or why they were given gift cards, such as for overtime work, ***since gift cards apparently were used sometimes to pay for overtime*** (T. 176), or gift cards for backpacks or turkeys (T.174), or for expenses, or for Christmas bonuses, as opposed to "Great Job" bonuses; or the locations at which the person(s) receiving the gift cards, or monies, were working. (T. 171-85).

Thus, it can hardly be said that SBM met its burden to establish either a consistent past-practice elsewhere of paying "Great Job" bonuses, let alone that the potential unit employees were aware of any such consistent practice elsewhere, or even at the Elkton facility.

"bonus" (T. 93, lines 19-23; p. 145); were a one-time thing (T. 91, lines 6, 16-17; p. 156, lines 13-18); and were not based on a consistent or expected past practice. (T. 93, lines 2-3).

While SBM claims that it distributed bonuses in December, 2013, several employees at the Friday safety meetings did no recall any such bonuses being distributed at those meetings. (T. 40, 45-46, 191-92). Moreover, given that it was SBM's burden to establish a consistent past practice, one would have expected that the Employer would have introduced evidence identifying each individual *unit* employee by name that received a "Great Job" bonuses in December, 2013; identified the amount of each such bonus; and tied to each such *unit* employee and bonus documentation to corroborate such testimony. Yet, SBM did no such thing. Given that gift cards sometimes were used apparently to pay for over time (T. 176), backpacks or turkeys (T. 163, 174), it would be particularly incumbent on the Respondent to differentiate the figures on its exhibits between those types of payments, or gift cards, that were for over time and those that were for "Great Job" bonuses. It has failed to do so in its brief to the Judge or to the Board.

Instead, all that SBM had done is point to an expense of $175 for Brian Wegemer (SBM Brief at p. 10). Yet, Wegemer was SBM's site manager at that time. (T. 40). The expense actually may have been, in whole or in part, for overtime, for a non-unit employee, for a Christmas bonus, or something else. Wegemer did not testify.

The questions are: Why didn't SBM clearly identify who allegedly received the December, 2013, "Great Job" bonus, why each received the bonus, and why didn't SBM back up its contention with appropriate and sufficient documentation and testimony? The Union need not provide the answer to those questions; it need only raise them to show that SBM failed to adequately answer them or meet its burden.

## II. LAW AND ARGUMENT

### A. SBM did not have a legitimate business reason for the timing and manner in which it paid the bonuses just 6 days before the representation election

As the Board has explained, and as the Judge recognized:

> "It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect.... As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene.... In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than the pending election, ***for the timing*** of the grant ***or announcement*** of such benefits."

DMI Distribution of Delaware, Ohio, Inc., 334 NLRB 409, 410-11 (2001) (JD, pp. 2-3) (emphasis added). In DMI, since that employer gave the employees a $100 bonus only a few days before the election, there was an inference that the grant of benefit was unlawful. *Id*. at 411. In DMI, the Board allowed that employer to rebut that inference of unlawful motive by "showing that there was a legitimate business reason ***for the timing*** of the bonus" *Id*. (emphasis added). Given the timing and manner of the payment of the bonus here, that same inference of unlawful motive should arise, as the Judge correctly understood.

Here, the Judge similarly recognized that an employer may have more than one reason for the granting of benefits and may "wish to reward its employees for a job well done," while also wanting "at the same time [to] influence them to vote against union representation." Because of the timing and manner of the bonus payment here, the Judge inferred that SBM had such a dual motive.

However, he allowed SBM to rebut such an inference of unlawfulness. One way to do this is by establishing a past practice of paying the same type of bonuses on a continuing or regular basis. (JD, p. 4, lines 12-19).

SBM asserts that the Judge's decision "rests upon the notion that SBM had never provided bonuses at the Elkton facility before and that the only manner in which SBM could rebut the presumption of coercion was through a past practice." (SBM Brief at 8). SBM argues that, while it did provide such Elkton bonuses prior to May 16, 2018, it further argues that establishing a past practice simply is not required under Uarco Inc., 216 NLRB 1, 2 (1974), though, nevertheless, all that it had to show -- SBM submits -- was a legitimate reason for providing the bonuses. (SBM Brief at 8-9).

The Union submits that SBM misstates how the Judge applied Board law. The Judge, in citing to B & D Plastics, 302 NLRB 245 (1991) and United Airlines Services, Corp., 290 N.L.R.B. 954 (1988), did not limit SBM's rebuttal to a past-practice defense. These cases recognize that an employer may rebut the inference, that benefits granted during the critical period are unlawfully coercive and objectionable, by means other than, or in addition to, past practices.[4/]

While SBM is correct that it may rebut the inference of unlawfulness by other means in addition to establishing a consistent and regular past practice of paying "Great Job" bonuses at

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[4/] For instance, in B & D Plastics, *supra* at 245, where that employer 2 days before the election gave the employees a paid day off, which was seen as tantamount to a substantial bonus, the Board did not hold that the only way to rebut the inference, that this conduct was intended to influence their votes, was through establishing a past practice of such paid days off, but also allowed that employer to come forward with *any other* "persuasive business justification for granting the benefit ***when it did***." (emphasis added). The Board even suggested *other* alternative means by which that employer could have achieved the result desired, none of which required a past practice of doing such. *Id*.

Elkton, its argument is beside the point. SBM has failed to advance or establish any such other defense or explanation for its actions!

Curiously, SBM never argues, justifies, or explains, *or even tries to explain*, the *timing* or *manner* in which it paid its May 16 bonuses, regardless of whatever "past practice" it weakly purports to have existed at Elkton or its other facilities. Given that SBM's highest on-site official had the employees go and stand in front of the room, hold out their hands, and, more importantly, close their eyes, clearly supports the Judge's conclusion that "the distribution of bonuses in this case was supposed to be, and was in fact a surprise..." (JD, p. 4 lines 19-20). Of course it was suppose to be -- and was -- a surprise! Otherwise, why close one's eyes?

And it was suppose to have a dramatic impact not only on the recipients, but also on the entire unit. Otherwise, why do it in public, in front of the rest of the potential unit, using the highest local management official? If all that SBM wanted to do was to reward a job well done, it could have done so just as it purportedly did in December, 2013 ... by using a gift card privately, or as it later did in August, 2014, when it paid bonuses, privately, in a "hush hush" fashion. (T. 80). But SBM had a dual purpose, so it did not distribute the gift cards privately just before the election! Oh no. That would not serve its dual motive. Just before the election, this time, it had to be an extravaganza!

The timing, then, and manner of the payment of the bonuses was a surprise and was supposed to be a surprise ... just 6 days before the election! Just as the Judge held: SBM had a dual motive .... and SBM has done nothing to rebut the inference that it did.

Given that the distribution of the bonus was done in such a dramatic, theatrical, and electrifying fashion in front of nearly all of the rest of the potential bargaining unit, it is significant

that the Employer has failed to show that this approach has ever been done anywhere else, **ever**, within the company. Certainly, this timing and manner of payment is sufficient to raise an inference that this action was coercive and intended to influence the employees' vote, even if there had been a scintilla of evidence of a past practice of paying Great Job bonuses. Yet, the Judge recognized that this inference was rebuttable if SBM could explain this curious timing and manner of payment.

Despite the Judge specifically questioning why SBM could not have waited a mere seven (7) more days until after the election to pay the bonuses, SBM has never even attempted to give an explanation for its timing, or for its failure to delay payment of the bonuses a few more days. Nor has SBM offered any rationale for why it paid the bonuses to the employees in front of the rest of the potential bargaining unit, or did so in such a dramatic and theatrical fashion, never asserting that it had a past practice of paying bonuses in any such unique fashion at its Elkton or any of its other facilities..... EVER!

Thus, regardless of whether SBM had a past practice of paying bonuses at its Elkton facility, or its other facilities -- an assertion which the Union submits is not supported by the Judge's findings or the record[5/] -- SBM's failure to establish a legitimate business justification for paying the bonus ***"when it did,"*** so close to the date of the election, or paying the bonus, ***as it did***, in such an unprecedented, unique, dramatic, and theatrical fashion in front of nearly all of the rest of the potential bargaining unit, together, overwhelmingly outweigh any possible past-practice defense.

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[5/] SBM contends that it had a legitimate business reason to provide these "Great Job" bonuses to recognize performance that went beyond expectations "of the client ." (SBM Brief at 9). Yet, that is not what the record establishes. It was not SBM's client, Merck, that established the 4-day estimate of how long it would take to do the Triple cleaning, but SBM, that established that estimate. (T. 152). The evidence was not conclusive that Merck required, or expected, that the Triple clean be done in 4 days or less. Moreover, Merck often praised SBM for its Triple cleans without SBM paying bonuses. (T. 158).

B. The Judge's implicit finding that SBM had not distributed "Great Job" bonuses to any employee at Elkton prior to May 16 2014, is based on the record and should not be reversed.

The Judge found that SBM had not distributed bonuses to any Elkton employee prior to May 16. (JD, p. 3, line 14). Read in context, it is obvious that the Judge implicitly meant that SBM had not given out any "Great Job" bonuses prior to May 16 at Elkton. (JD, p. 3, lines 15-21, 35-47). There is evidence in the record to support this finding and, therefore, it should be upheld by the Board, absent significant, contrary, credited evidence. *See*, Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078 (9th Cir. 1977). There is no such contrary credible, let alone credited, evidence.

As shown above, the so-called safety, or poker, "bonuses" were significantly different in kind than were the "Great Job" bonuses. They were not contingent solely on having worked safely, but on having drawn the best poker hand, so there was an element of chance involved unlike the "Great Job" bonuses; not all eligible, safe employees received the bonus; it was a one-time thing; and there was no expectation that it would occur again. Thus, the poker "bonuses" do not establish SBM's past practice defense. Star, Inc., 337 NLRB No. 151 (2002)(Since the type and timing of prior bonuses were significantly different than the pre-election bonus, that employer could not rely on them as establishing its past-practice defense).

As to the December, 2013, allegedly "Great Job" bonuses at Elkton, on which SBM relies to establish its past practice, there was insufficient evidence to meet the Employer's burden to establish which, if any, potential ***unit*** employee was paid any such bonus, as opposed to overtime pay, etc., through use of gift cards, and no evidence as to how long after the work was done before the gift card was issued. Also, apparently, the gift card was privately issued, unlike the May 16 circus. Clearly then, the May 16 bonuses were a significant departure even from the so-called

alleged privately-issued December, 2013, or August, 2014, "hush hush" bonus "practices" and, therefore, are of no support for that defense. *Id.*

The Judge found that the May 16 bonuses were not insignificant compared to the employees' weekly wages (JD, p. 5, line 17), a conclusion not effectively challenged by SBM. In SBM's Brief at 11n.5 and SBM Exception No. 1, SBM quibbles with the Judge's conclusion that the $100 checks were not insignificant compared to the employees' typical weekly wages. However, at least one employee testified to making about $300 per week (T. 52), though it is not clear whether this was her gross or net pay. Nevertheless, whether this employee's gross pay typically was $300 or $395.20, as SBM asserts, or, if she, or another employee, were a probationary employee, she may have been making $9.25/hour, or $370 per week (T. 144), then a check for $100 still would not be an "insignificant" amount for her.[6/]

C. SBM has not met its burden to show that it had a consistent past practice of paying "Great Job" bonuses at the Elkton facility.

Alternatively, SBM contends that it has had a past practice of paying "Great Job" bonuses elsewhere in its company, which it purportedly has continued at the Elkton facility. SBM correctly recognizes that it bears the burden of proof on this issue and the evidence to show that such a practice must occur "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." Sunoco, Inc., 349 NLRB 240,

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[6/] In DMI, *supra* at 411, that employer's $100 cash bonus to Brown and Bennett for their extra work 2-days before the election was found to violate 8(a)(1) despite DMI having given out cash bonuses only "a couple" of times before at its facility involved in its 2-years of operation. Apparently, "a couple" of times before is not sufficient to establish a regular consistent past practice.

Furthermore, the $100 bonus apparently was deemed coercive without regard to the comparative amount of Bennett's or Brown's weekly wage, since their wages were not even discussed by that judge or the Board in relation to the amount of that $100 bonus.

244 (2007) (SBM Brief at 12). While SBM asserts that it has met this standard, the Judge and the Union disagree.

In DMI, *supra* at 411, the Board found it irrelevant that there was a past practice of paying cash bonuses for extra work at other facilities, since that judge failed to consider whether it was also a past practice at the facility in question. Here, SBM relies on Respondent Exhibits 4 and 5, both of which are the subject of the Union's Cross-Exception No. 5 as having been improperly admitted by the Judge, over objection, on relevancy and other grounds. Significantly, there is no evidence here that any of the potential unit employees were aware of any consistent or regular practice, elsewhere, of SBM paying "Great Job" bonuses. Moreover, SBM admitted that it has no companywide bonus policy and each site establishes its own *ad hoc* criteria. Consequently, none of the evidence regarding SBM's practices at its other facilities has any relevance here. Thus, evidence about SBM's practices elsewhere should not have been admitted and should not be considered. *Id.* Whatever SBM may, or may not do elsewhere, what it does at Elkton is not a continuation of that practice.

SBM next relies on its purported one-time payment of a "Great Job" bonus to some unnamed Elkton employee, or employees, in December, 2013, as establishing this continuation. Its evidence does no such thing. Despite having, presumably, all necessary evidence within its control to establish this contention, SBM failed to identify each *unit* employee who supposedly received the December "Great Job" bonus, the amount each *unit* employee received, and it failed to tie appropriate testimony to corroborating documentation, or describe for what the bonus was awarded. All that SBM apparently has established is that a supervisor expensed $175 in December.

Nevertheless, even if SBM had established such details, the Board's decision in DMI, *supra* at 411 makes clear that such a one time, *ad hoc* bonus payment, if that is what it was, still, is not

sufficient to rebut the inference of unlawful motive. A "couple of" or one-time *ad hoc* bonus payments do not a practice make. *Id.*

SBM's effort to bolster this weak "Great Job" bonus evidence through reference to the one-time safety poker bonus program (SBM Brief at 12-13) similarly must fail. The two types of programs are significantly different and, as the Board recognized in Star, Inc., *supra*, one type of a so-called bonus "practice" is not sufficient to establish another type of a so-called bonus "practice."

## III. CONCLUSION

For the reasons stated above, as well as for the reasons set forth in the brief of the Counsel for the General Counsel opposing SBM's exceptions to the Judge's Decision in this case, the Judge's findings of unlawful 8(a)(1) activity should be sustained.

SBM has not directly and specifically addressed the Judge's finding that its unlawful activity regarding the bonuses also constituted objectionable conduct supporting his recommendation that the election be set-aside and re-run. Therefore, the Union finds it unnecessary to more specifically address those findings here other than to say that its supports the Judge's reasoning on that account and urges the Board to adopt his finding of objectionable conduct and his order to set aside and re-run the election.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been sent this 3rd day of February, 2015, via email to the following:

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